Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

LEVI THURSTON,
PETITIONER

V.

STATE OF MISSOURI,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS FOR THE SOUTHERN
DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether the Due Process Clause of the 14th Amendment is violated where Petitioner is tainted with all undesirable elements of a conviction and judgement, yet is denied access to appellate review through application of a permanent suspension of imposition of sentence.

2. Whether the congruence of **RSMo 221.070**, **RSMo 557.011** and **RSMo 558.016** as interpreted through **State v. Lynch, 679 SW2d 858**, has created a legal chimera in which the Missouri state statutes, while individually constitutional, create an unconstitutional whole.

3. What the distinction is between suspension of imposition of sentence and suspension of sentencing, as even the trial court in this instant matter evinced confusion over the precise effects of suspension of imposition of sentencing.

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In The

Supreme Court of the United States

No. _____

Levi Thurston,
Petitioner

v.

State of Missouri,
Respondent

On Petition for Writ of Certiorari
To the Missouri Court of Appeals for the Southern
District, Division Two

Petition for Writ of Certiorari

The Petitioner, Levi Thurston, respectfully requests this Court to issue a Writ of Certiorari to review the opinion of the Missouri Court of Appeals, Southern District, Division Two, entered in this instant matter on March 29, 2001.

Opinion and Jurisdiction

On March 29, 2001, the Missouri Court of Appeals for the Southern District, Division Two, issued a dismissal opinion in Petitioner's appeal against the Circuit Court of Ozark County, Missouri, said case being entitled **State of Missouri v. Levi Dean Thurston, #23506**, entered on Pages A1 - A2. On May 29, 2001, the Supreme Court of the State of Missouri refused Petitioner's request for review, entered on Page A3. These actions confirmed the opinion of Circuit Court Judge Noble Leighton. The jurisdiction of this Court is thereby invoked under **Title 28 § 1257** of the United States Code.

Constitutional Provisions Involved

Constitution of the United States, Amendment XIV:
".....nor shall any State deprive any person of life, liberty, or property, without due process of law ; ..." & *".....nor deny to any person within its jurisdiction the equal protection of the laws."*

STATEMENT OF THE CASE

Introduction

The Missouri Supreme Court ruled, in **State v. Lynch, 679 SW2d 858**, that a Missouri trial court may permanently suspend imposition of sentencing.

In the case of **Miller v. Aderhold, 288 US 206**, this Court ruled a federal court could not permanently suspend imposition of sentencing and that any order permanently suspending imposition of sentencing was void. However, this Court has not ruled on whether that standard also applies to state courts. Petitioner is, therefore, seeking a review of permanent suspension of imposition of sentencing as applied in this instant matter.

Factual Background

This matter arises from an arrest on August 23, 1999 in which Ozark County (MO) Sheriff Steve Bartlett arrested Petitioner, charging him with trespass in the first degree, a misdemeanor. A $1,000.00 cash only bond was set, which took Petitioner twelve days, from inside the jail, to raise. Petitioner proceeded Pro Se throughout this instant matter. He waived jury trial and the case proceeded as a bench trial on January 18, 2000. Upon closing, the case was taken under advisement. Sentencing was held February 22, 2000.

Circuit Court Decision

At sentencing, the trial court ruled against Petitioner, finding him guilty and assessing costs pursuant to **RSMo 221.070**. The trial court also placed Petitioner on unsupervised probation for six months, then suspended imposition of sentencing (SIS) per **RSMo 557.011(2)(3)**. Petitioner timely objected to the suspension of imposition of sentencing and requested sentencing for purposes of appeal

but was denied. Costs were taken from Petitioner's bond and the remainder ordered returned to Petitioner. On February 28, 2000, Petitioner noticed the trial court that he intended to appeal its decision and, on March 2, 2000, filed formal notice of appeal.

Court of Appeals Decision

The Missouri Court of Appeals, Southern District, Division Two, took the appeal from the Circuit Court of Ozark County. Petitioner briefed the objection to suspended imposition of sentencing and merits of the case. Petitioner raised 14th Amendment equal protection and due process violations as suspended imposition was applied in this instant matter and other violations of substantive rights protected under the state and federal constitutions as regards the merits of the case. Petitioner's appeal was dismissed on March 29, 2001. The Missouri Court of Appeals stated in its dismissal that it was bound by the Missouri Supreme Court's decision in **State v. Lynch,** which held that an appeal by a defendant in a criminal case is permitted only from a final judgment; and a final judgment requires imposition of sentence. Petitioner timely and properly filed an application for transfer of appeal to the Missouri Supreme Court.

Missouri Supreme Court Decision

The Missouri Supreme Court issued a docket number for the application for transfer. The application for transfer raised the issues of objections to suspended imposition of sentencing and merits of the case. On May 29, 2001, the Missouri Supreme Court dismissed the application for transfer by mandate. No reason was given for denial of the application for transfer of appeal.

Reasons for Granting this Writ

1. This Court should grant review of a state court permanently suspending imposition of sentencing to clarify the dichotomy between **Miller v. Aderhold, 288 US 206** and **State v. Lynch, 679 SW2d 858** in support of **RSMo 557.011,** and the applicability of the **Miller** standard to state courts.

The first question presented is whether a state court has the capacity to permanently suspend imposition of sentencing. Petitioner seeks review of a state court decision in this instant matter, said decision conflicting with a relevant decision of this Court, as set forth in **Supreme Court Rule 10(c)**.

Petitioner holds that the rule in **Miller v. Aderhold**, i.e. any order for a permanent suspension of imposition of sentencing is void, also holds true in state courts. In furtherance of this, the **Miller** Court stated a defendant could request sentencing and the trial court was to impose sentence, unless good cause to the contrary was shown. In this instant matter, Petitioner requested such for purposes of appeal and, over his objections, the trial court refused to impose sentencing, not showing any cause, much less good cause, for its actions.

The Missouri Supreme Court, in **State ex rel Garnholz v. La Driere, 299 SW2d 512**, held that the right of appeal in a criminal case is purely statutory. The Missouri Supreme Court further held, in **State v. Murphy, 626 SW2d 649**, that for appellate process to commence, imposition of sentence must occur. Thus, if no sentence was handed down and permanent suspension of imposition of sentencing does not constitute judgement, no appeal can take place. Accordingly, both the appellate court and the Mis-

souri Supreme Court denied review, exhausting all Petitioner's available state remedies.

The Missouri Constitution, in **Article 5 § 2**, states that, for purposes of judicial review, the highest court in Missouri is the Missouri Supreme Court. Thus, between the Missouri Constitution and the statutes of Missouri, a very clear path of appellate jurisdiction was laid down, one open to all persons convicted of a crime. This Court stated, in **Blackledge v. Perry, 417 US 21**, that while it has never held that the States are constitutionally required to establish avenues of appellate review of criminal convictions, *"it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."* Thus either everyone in like circumstance must be denied appellate review or everyone be allowed appellate review.

If every person were denied the right to seek review of a case in Missouri, Petitioner would have no argument. However, Petitioner finds himself in a group of individuals who find themselves cut off from the appellate process by a system which allows the trial court to cover any mistakes or improprieties made during trial by simply suspending imposition of sentence and all right of appeal in the State of Missouri. That this would allow for out of control courts, answerable to no one but themselves, goes without saying. Even worse is the possibility of other public servants using this as a means to ensure that no oversight of local trials takes place, allowing judicial misconduct, prosecutorial misconduct, legal malpractice, perjury, etc. to all be swept under a rug of suspended silence. This Court decided, in **Miller v. Aderhold**, that to allow such liberties on the part of a trial court would go above and beyond the protections to equal protection and due process set forth in the Constitution of the United

States.

In fact Petitioner was actually challenged by the trial court, *"if there is a way in which you can appeal my sentencing then you do so. Okay?"* Petitioner considers that to be the judicial equivalent of throwing the gauntlet down and precisely the reason why this Court decided not to allow such actions in federal courts.

The State of Missouri will doubtless argue that this is not a matter of constitutional import, only a question of the legislature of the Missouri and the Supreme Court of Missouri passing legislation on the activities of state courts. Petitioner would note that, in **Shelley v. Kramer 334 US 1**, this Court noted that state courts are not immune to review, i.e. *"The short of the matter is that, from the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes the action of state courts and state judicial officials."*

At this point in time, in Missouri, what access there is to the appellate process is in name only. There is the form of appeal because Petitioner can file the necessary papers but there is no substance because there is no review of the lower courts actions. The use of suspended imposition of sentencing in this instant matter is clearly prejudicial to Petitioner as it shields the State from any appellate review of the evidence, behavior or tactics used to gain a conviction... a state of affairs supposedly only to be found in countries such as the former Soviet Union.

As a result, a question is raised as to the applicability of **Miller v. Aderhold** in state cases. While the **Miller** decision only applies to federal cases, Petitioner can find no reason why a federal defendant would have constitutional protections against this form of injustice yet state defendants would be denied this selfsame protection of equal

protection and due process. As such, at this point in time a dichotomy exists in this instant matter which Petitioner requests this Court clarify. Either **RSMo 557.011** is unconstitutional on its face as denying basic federal constitutional rights, **State v. Lynch** is a flawed interpretation of said statute or the two together have created a chimera in which the end result is greater than the sum of its parts, and far greater than intended. In either instance, clarification of the standard to be used should be laid down in its finality.

2. The congruence of **RSMo 221.070, RSMo 557.011** and **RSMo 558.016** as interpreted through **State v. Lynch, 679 SW2d 858**, has created a legal chimera in which the Missouri state statutes, while individually constitutional, create an unconstitutional whole.

Petitioner notes that each of the individual statutes mentioned above would doubtless meet constitutional muster if it stood alone. What Petitioner contends, as supported by Judge Blackmar in the dissenting opinion in **Lynch**, is that the Missouri legislature, supported by the Missouri Supreme Court, has created a situation wherein an individual can be convicted and punished on little or no real evidence and be completely without recourse, except on federal constitutional grounds.

In this instant matter, Petitioner spent 12 days in the Ozark County Jail, was deprived of $499.50 of his money, had a criminal record created... then was told he had no recourse under Missouri statute. While Petitioner understands that no one person or group of persons may understand all the potential complexities, loopholes and traps which may arise under any statutory and regulatory scheme, Peti-

tioner also believes that, once these problems are brought to the attention of the appropriate individuals, they should be rectified with all due speed. Instead, Missouri has decided to go the route of enshrining this trap, via the **Lynch** decision, even after its highest court split 4-3 on whether or not to allow it.

Less than a generation ago, a trial court would be allowed to determine, within meets and bounds set forth by statute, what the punishment an individual would face, using its intelligence and humanity in equal measures. However, in an effort to stem what were perceived as abuses of authority on the part of the courts through meting out punishments much less or much greater than deserved by a given criminal act, legislatures started prescribing specific punishments for various crimes, oftimes without allowing mitigating circumstances to be considered. This created a state of injustice as egregious, if not more so, than what had existed previously. Thus the concept of salutary relief came to the fore. Under this theory of law, a trial court, upon being faced with an offender who did not deserve the punishment designated, would suspend imposition of sentence for a period of time (usually 6 months to 1 year) during which time the offender would be on probation. If probation were successfully completed, the matter would be as if he had never been convicted. Since the **Lynch** decision, this is not how things work in Missouri anymore.

In **Lynch**, the Missouri Supreme Court noted that the current statutory scheme for suspension of imposition of sentence does not equate to salutary relief in that a person convicted but not sentenced carries with him all the burdens of being convicted except incarceration, i.e. his records are available to the *"courts, administrative agencies, law enforcement agencies, and federal agencies for the*

purposes of prosecution, litigation, sentencing, parole consideration and to federal agencies for such purposes as authorized by law or presidential executive order" (per **RSMo 610.120**) and is also denied the right to appeal the decision that set those burdens upon him. To state that this case split the Missouri Supreme Court would be an understatement. Judge Blackmar, in the main dissenting opinion, wrote that

> *"...the initial thought behind suspension of imposition of sentence (SIS), as authorized by* ***§557.011(3), RSMo 1978,*** *was that the conviction and ensuing stigma would be eradicated on the successful completion of the period of probation. The logic of* ***State ex rel Peach v. Tillman, 615 SW2d 514 (Mo.App 1981)*** *is that the defendant is not aggrieved by the initial finding of guilty and may never be. By this reasoning, it is easy to say that the judgement is not final. The legislature, however, departed from the pure theory of SIS in imposing the indelible consequences detailed in the principal opinion... My concern is heightened because the conviction seems to be a very doubtful one.... So far as I can discern, the principal opinion holds that there is no means whatsoever of correcting this apparent wrong."*

The state of affairs in Missouri is such that even judges on the highest court feel their hands constrained in the administration of justice by an unfortunate juxtaposition of statutes, who's effects are crystal clear in hindsight but which may not have been so at the time of their passage. Petitioner feels there are but two solutions to this dilemma. The first is that this Court reverse the **Lynch** decision as allowing for unconstitutional infringement on Petitioner's right to equal protection and due process. The second is that this Court nullify some, or all, of the statutes noted, which created the unfortunate situation noted by Judge

Blackmar. While reversal of the **Lynch** decision is likely to be viewed more favorably in the short term, Petitioner would note that unless these statutes have some limitations placed upon their use in a conjoined manner, this situation will arise again. Petitioner feels that a stringent examination of both the specifics of this matter, as applied to these Missouri statutes, as well as a general examination of like statutes in other states, be made in order to ensure complete compliance with this Court's decision in this instant matter.

3. A clear and precise definition of the difference between suspension of imposition of sentence and suspension of sentencing needs to be laid down as even the trial court in this instant matter evinced confusion over the precise effects of suspension of imposition of sentencing.

Petitioner would note that during sentencing, the trial court did not appear to know, until informed by the prosecutor, that his suspending imposition of sentence would cut off Petitioner's right to appeal. **Corpus Juris Secundum, 24 § 1571(1), Criminal Law,** reads *"It should be noted that the term "suspension of sentence" is often used indiscriminately to include both a situation where the pronouncing of sentence is suspended and one where sentence has been pronounced but execution thereof is suspended; but the courts sometimes sharply distinguish between the two situations."* Petitioner contends that the lack of a defined, universal standard for the meanings of "suspension of sentence" and "suspension of imposition of sentence" have resulted in many situations where an individual's constitutional rights are inadvertently transgressed against by a trial court which does not recognize that there is a distinct dif-

ference. This Court, in **Miller v. Aderhold**, stated that *"In a criminal case, final judgement means sentence; and a void order purporting to permanently suspend sentence is neither a final nor a valid judgement."* Thus, without a final distinction between what is allowed and what is not allowed and, for all the talk of words never hurting someone, the indiscriminate use of words which have never had a clear-cut definition of their meaning handed down has allowed Missouri trial courts to damage innocent individuals who they might have actually been attempting to help. Therefore, in the interests of justice, Petitioner feels a finality of definition of this must needs be set down.

Conclusion

For the foregoing reasons, Petitioner's petition for writ for certiorari should be granted.

Dated this 21st day of August, 2001

Respectfully submitted

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Appendix

Missouri Court of Appeals
Southern District, Division Two

State of Missouri, Plantiff-Respondent,	)	
vs.	)	No. 23506
Levi Dean Thurston, Defendant-Appellant	)	

Appeal from the Circuit Court of Ozark County

The Honorable Noble I. Leighton, Associate Circuit Judge

APPEAL DISMISSED

Appellant filed a notice of appeal following a non-jury trial in which the trial court found him guilty of trespass and suspended the imposition of sentence, placing him on probation for six months. Respondent has moved to dismiss the appeal, contending that as Appellant received a suspended imposition of sentence, there is no final judgment and no appeal lies.

Appellant makes various arguments in response to the motion to dismiss filed by Respondent, including that costs were assessed against him. Nevertheless, we are compelled to dismiss the appeal. This Court is bound by the decisions of the Supreme Court of Missouri, Mo.Const. Art. V, Section 2. That Court has held that an appeal by a defendant in a criminal case is permitted only from a final judgment and a final judgment requires imposition of sentence. **State v. Lynch, 679 SW2d 858, 960 (Mo. banc**

1984). As that appears to be the last decision by the Supreme Court of Missouri on the issue presented, it is compelling upon us.

The appeal is dismissed.

James K. Prewitt, Judge
Garrison, J., and Rahmeyer, J., concur.

In the Supreme Court of Missouri

SC83592
SD23506

May Session, 2001

State of Missouri,
Respondent,

vs. (TRANSFER)

Levi Dean Thurston,
Appellant.

Now at this day, on consideration of the Appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Southern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2001, and on the 29th day of May, 2001, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 29th day of May, 2001.

_____/s/_____Clerk
_____D.C.

RSMo 557.011
Authorized dispositions

1. Every person found guilty of an offense shall be dealt with by the court in accordance with the provisions of this chapter, except that for offenses defined outside this code and not repealed, the term of imprisonment or the fine that may be imposed is that provided in the statute defining the offense; however, the conditional release term of any sentence of a term of years shall be determined as provided in subsection 4 of section 558.011.

2. Whenever any person has been found guilty of a felony or a misdeameanor the court shall make one or more of the following dispositions of the offender in any appropriate combination. The court may:

(1) Sentence the person to a term of imprisonment as authorized by chapter 558, RSMo;

(2) Sentence the person to pay a fine as authorized by chapter 560, RSMo;

(3) Suspend the imposition of sentence, with or without placing the person on probation;

(4) Pronounce sentence and suspend its execution, placing the person on probation;

(5) Impose a period of detention as a condition of probation, as authorized by section 559.026, RSMo.

3. Whenever any person has been found guilty of an infraction, the court shall make one or more of the following dispositions of the offender in any appropriate combination. The court may:

(1) Sentence the person to pay a fine as authorized by chapter 560, RSMo;

(2) Suspend the imposition of sentence, with or without placing the person on probation;

(3) Pronounce sentence and suspend its execu-

tion, placing the person on probation.

4. Whenever any organization has been found guilty of an offense, the court shall make one or more of the following dispositions of the organization in any appropriate combination. The court may:

(1) Sentence the organization to pay a fine as authorized by chapter 560, RSMo;

(2) Suspend the imposition of sentence, with or without placing the organization on probation;

(3) Pronounce sentence and suspend its execution, placing the organization on probation;

(4) Impose any special sentence or sanction authorized by law.

5. This chapter shall not be construed to deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. An appropriate order exercising such authority may be included as part of any sentence.

State of Missouri
Plaintiff-Respondent,

v.

Claude Lynch, Defendant-Appellant

No. 66043

Supreme Court of Missouri, En Banc
Nov. 20, 1984

Defendant was convicted in the Circuit Court, City of St. Louis, Jean C. Hamilton, J., of second-degree burglary and imposition of sentence was suspended by trial judge, defendant was placed on probation for one year, and appealed. The Court of Appeals, Eastern District, dismissed defendant's appeal finding that imposition of sentence was not a final, appealable judgment, and Supreme Court granted a transfer. The Supreme Court, Gunn, J., held that: (1) suspension of sentence was not a final appealable judgment, even though some prejudice of a conviction attaches without sentencing, and (2) Supreme Court could not establish a new rule pertaining to rights of appeal which would be contrary to statutory authority providing that appeal could only be had from a final judgment.

Appeal dismissed.

Blackmar, J., dissented and filed opinion in which Rendlen, C.J., and Welliver, J., concurred.

Timothy F. Devereux, Clayton, for defendant-appellant.

John Ashcroft, Atty. Gen., Deborah Neff, Asst. Atty. Gen., Jefferson City, for plaintiff-respondent.

GUNN, Judge.

The issue in this case is whether a defendant may appeal from a conviction in which there is a suspended imposition of sentence ordered by the trial court. The Eastern District of the Missouri Court of Appeals found that a suspended imposition of sentence is not a final, appealable judgment and dismissed defendant's appeal. This Court granted transfer, and on consideration of the same issue we reach a similar conclusion.

In a court tried case, defendant was convicted of second degree burglary - a violation of Section 569.170, RSMo 1978. Imposition of sentence was suspended by the trial judge, and defendant was placed on probation for one year. Defendant sought to appeal his conviction, but on the state's motion defendant's appeal was dismissed by the Court of Appeals for the reason that there was no final judgment. Thus, the controversy centers on whether a suspended imposition of sentence is a final judgment. It is not. This seems simple enough, but the facts of this case and the dilemma in which defendant finds himself give cause to ponder the controlling legal rubric.

(1) An abundance of precepts afford guidance. Absolutely fundamental is the principle that the right to appeal is statutory. We start and build from this point. *"The right of appeal in a criminal case is purely statutory, no such right existed at common law."* **State ex rel. Garnholz v. La Driere, 299 SW2d 512, 515 (Mo. banc 1957)**; the right to appeal is based upon statutory law. *"Without underlying statutory*

authority there is no right to an appeal." **United Labor Committee, Inc. v. Ashcroft, 572 SW2d 446, 447 (Mo. banc 1978).**

Next, appeal in Missouri is limited to cases of final judgment. **Section 547.070, RSMo (1978),** governing the right to appeal in criminal cases, specifically makes that provision: *In all cases of* ***final judgment*** *rendered upon any indictment or information, an appeal to the proper appellate court shall be allowed to the defendant, provided, defendant or his attorney of record shall during the term at which the judgment is rendered file his written application for such appeal.* (Emphasis added)

(2) The next basic premise is that judgment in a criminal case does not become final for purposes of appeal until sentence is entered. Imposition of sentence must occur before the appellate process can begin. **State v. Murphy, 626 SW2d 649, 650 (Mo. App. 1981).**

State ex rel Wagner v. Ruddy, 582 SW2d 692 (Mo. banc 1979) states that *"(t)he very term 'sentence' has been defined to mean 'judgment or final judgment,' and a criminal case is not ripe for appeal if no sentence has been pronounced."* **Id. at 649.**

This statement is congruent with the following holding of **State v. Harris, 486 SW2d 227 (Mo 1972)**: For purposes of this provision (Section 547.070), final judgment requires the imposition of sentence. **State v. Jaeger, Mo. Sup., 394 SW2d 347, 352[7]; State v. Kelly, 206 Mo. 685, 105 SW 606, 608.** When a defendant has been found guilty by a jury verdict which assesses the punishment, an appeal by the defendant prior to the pronouncement of sentence and

entry of judgment is premature. **Id. at 229.**

The following quote from **State v. Motley, 546 SW2d 435 (Mo.App. 1976)** is also appropriate: The Missouri Supreme Court, discussing the concept of sentencing, has stated: *"In its technical legal sense the sentence generally constitutes and has the same meaning as judgment or final judgment or determination against accused in a criminal case."* **Id. at 436 (quoting from State v. Pruitt, 169 SW2d 399, 400 (Mo. 1943))**.

(3) The foregoing leads to the following conclusion of the cynosure of this case: suspended imposition of sentence is not a final judgment for purposes of appeal. **State v. Gordon, 344 SW2d 69 (Mo. 1961)**, in defining a suspended imposition of sentence, states: The phrase 'suspended sentence' is not a 'sentence' at all but is used to describe the act of withholding the 'sentence' in a case. A 'suspended sentence' is not a 'sentence' within the meaning of that word ..... **Id. at 71.**

(4) An accurate definition of 'suspension of sentence' is provided in **24 CJS Section 1571(1)(a) (1961)**, as follows: *"Suspension of sentence is a suspension of active proceedings in a criminal proceedings in a criminal prosecution. It is not a final judgment, or the equivalent of a nolle prosequi or discontinuance, nor does it operate as a discharge of accused."*

Finally, **State ex rel. Peach v. Tillman, 615 SW2d 514 (Mo.App. 1981)**, specifically and correctly finds that suspended imposition of sentence is not a final appealable judgment. It *"is a hybrid in the law."* **Id. at 517.**

Most recently, in **State v. LaPlant, 673 SW2d 782, 785 (Mo. banc 1984)**, this Court recognizes that with an SIS and the suspension remaining in effect, no 'judgment' exists.

So it is by virtue of the suspension of imposition of sentence, which is not a final, appealable judgment, that defendant's conviction is not ripe for appeal; hence, his dilemma. This was brought about by statutory changes and case law subsequent to **State ex rel. Peach v. Tillman, supra.**

The rationale for the Eastern District's decision in **Tillman** and in support for finding that suspended imposition of sentence provides no final judgment was stated as: Suspension of imposition of sentence is a salutary means of relieving a person who is guilty of a crime from the stigma of a conviction when the court in its discretion feels that the ends of justice warrant the court's forbearance. **Id. at 517.**

Tillman, supra, also notes that a suspension of imposition of sentence is *"not a conviction within the meaning of the Second Offender Act... nor can it (the finding of guilt) be used to impeach a witness..."* **Id. at 517.**

(5) The reasoning cited in **Tillman**, however, is no longer applicable due to recent legislative enactments. The stigma of a conviction now attaches before sentencing. For instance, **Section 491.050, RSMo Cum. Supp. 1983**, provides: (A)ny prior pleas of guilty, pleas of nolo contendere, and finding guilty may be proved to affect his (the witness') credibility in criminal case. Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that

inquiry, and the party cross-examining shall not be concluded by his answer.

By virtue of this statute, a defendant is subject to impeachment merely upon a finding of guilty by a trier of fact. **State v. Jackson, 651 SW2d 547, 548 (Mo. App. 1983)**.

(6) A defendant also suffers the prejudice of a conviction even if imposition of sentence is suspended, in that his finding of guilt confers upon him the 'prior offender' status under **Section 558.016 RSMo Cum. Supp. 1983**.

In **State v. Acton, 665 SW2d 618 (Mo. banc 1984)**, this Court held that prior pleas of guilty with suspended sentences under former drunk driving statutes constituted convictions for the purpose of enhancing a defendant's sentence. Similiarly, **State v. Preston, 673 SW2d 1 (Mo. banc 1984)**, holds that a guilty plea with suspended imposition of sentence can be used as an aggravating circumstance under **Section 565.006.2, RSMo Cum.Supp. 1983 (repealed, Mo. Laws, S.B. 276 Section 1 and replaced by Section 565.032.1(3), effective July 1, 1984)**.

State v. LaPlant, 673 SW2d at 785, allows the use of a guilty plea with suspended imposition of sentence for impeachment purposes and as a prior conviction for sentencing purposes. This is so notwithstanding that LaPlant's SIS conviction was prior to the enactment of **Section 491.050, RSMo Cum.Supp. 1983**.

Thus, a suspended imposition of sentence now carries with it the stain of certain undesirable attributes of a conviction, such as use for enhancement of punishment, prior offender status, impeachment and aggravating circum-

stance.

To counter defendant's position that he is disadvantaged by the SIS without appeal, the state argues that a defendant who has received a suspended imposition of sentence will have the official records relevant to his or her case closed upon successful completion of probation. The state contends that this provision separates the defendant from other criminal defendants who have had their sentences imposed immediately. Although the state is correct in asserting that **Sections 610.105** and **610.106 RSMo Cum.Supp. 1983**, provide a procedure for closing a defendant's record and making such records inaccessible to the general public the beneficial impact of the closed records statutes is greatly reduced by **Section 610.120, RSMo Cum.Supp. 1983**. This latter provision makes available 'closed records' to the *"courts, administrative agencies, law enforcement agencies, and federal agencies for purposes of prosecution, litigation, sentencing, parole consideration and to federal agencies for such investigative purposes as authorized by law or presidential executive order."* Therefore, the provisions cited by the state do not offer the defendant who has received a suspended imposition of sentence any significant amount of confidentiality. **State v. Bachman, 675 SW2d 41, 49 (Mo.App. 1984)**.

(7,8) However, the discussion of defendant's plight does nothing to relieve it. The fact remains that a suspended imposition of sentence is not a final judgment. Right of appeal in criminal cases is limited by statute to final judgments. **Section 547.070, RSMo 1978**. This Court should not, indeed cannot due to constitutional restraints, establish some new rule pertaining to rights of appeal which would be contrary to extant statutory authority. **State ex**

rel. Garnholz v. La Driere, 299 S.W.2d at 515-17. (Footnote: As suggested by the Eastern District, defendant may request the trial court to impose sentence, e.g. a suspended execution of sentence, and thereby have his final appealable judgement. Remedial legislation by the General Assembly is another course available)

Appeal dismissed.

HIGGINS, BILLINGS and DONNELLY, JJ., concur.

BLACKMAR, J., dissents in separate opinion filed.

RENDLEN, C.J., and WELLIVER, J., dissent and concur in separate dissenting opinion of BLACKMAR, J.

BLACKMAR, Judge, dissenting.

The principal opinion unnecessarily allows the trial judge to place the indelible brand of felon on a defendant without allowing the defendant appeallate review.

I agree that the right of appeal is purely statutory, but there is a firm statutory policy of affording an appeal from a criminal conviction which carries indelible consequences.

The initial thought behind suspension of imposition of sentence (SIS), as authorized by **Section 557.011(3), RSMo 1978**, was that the conviction and ensuing stigma would be eradicated on the successful completion of the period of probation. The logic of **State ex rel. Peach v. Tillman, 615 S.W.2d 514 (Mo.App. 1981)** is that the defendant is not aggrieved by the initial finding of guilty and may never be. By this reasoning it is easy to say that the judgment is

not final.

The legislature, however, departed from the pure theory of SIS, in imposing the indelible consequences detailed in the principal opinion. There was apparent feeling that drunken drivers and drug merchants were not being adequately punished. The indelible consequences are the hallmark of finality. The logic of **State ex rel. Peach v. Tillman, supra,** no longer applies, and we should not perpetuate it.

My concern is heightened because the conviction seems to be a very doubtful one. A landlord is found guilty of burglary because one item of property of a delinquent tenant, who had apparently abandoned the premises, was found in his apartment. So far as I can discern, the principal opinion holds that there is no means whatsoever of correcting this apparent wrong.

I suppose that the defendant might reject the SIS and ask for a sentence with suspended execution. But defendants should not have to play Russian Roulette in the pursuit of justice.

Another possibility would be to permit an appeal at the expiration of the period of probation. I assume that, if a defendant receives SIS and then violates the conditions of probation, the ensuing sentence would constitute a final and appealable judgment. The expiration of the probation period would render the conviction, with ensuing consequences, as final as it will ever be. So, at the very least, I would treat the notice of appeal as having been filed at the expiration of the suspension period and would proceed to the merits.

Under either theory I would retransfer the case to the Court of Appeals for consideration of the merits.

IN THE MISSOURI COURT OF APPEALS,
SOUTHERN DISTRICT

STATE OF MISSOURI, Respondent, v. LEVI DEAN THURSTON, Petitioner	)))))	Cause No. SD23506

IN THE OZARK COUNTY CIRCUIT COURT FORTY-FOURTH JUDICIAL CIRCUIT, ASSOCIATE DIVISION
Honorable Noble I. Leighton, Judge

STATE OF MISSOURI, Plaintiff, v. LEVI DEAN THURSTON, Defendant	)))))	No. CR499-768M

TRANSCRIPT ON APPEAL

APPEARANCES:
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Transcribed by Elaine Tyler, Central Transcribing Service, Office of State Courts Administrator

THE COURT: Also on January 18 of this year, the case of State of Missouri vs. Levi Dean Thurston was heard by this Court on a charge of trespass in the first degree. The Court also at that time took the same under advisement, and today is for the sentencing. Mr. Levi Thurston is present as is Mr. Tom Cline, the Prosecuting Attorney. Come -- That's all right. Come forward, Mr. Thurston, and have a seat. Do you have any statements to say prior to the Court's sentencing? Any reason the sentence can't be executed at this time or announced?

MR. THURSTON: At this time, I don't think there's any reason (indiscernible).

THE COURT: Mr. Cline.

MR. CLINE: Your Honor, following the trial, Mr. Thurston, had made a comment that he had had some contacts with authorities in Tennessee, and I contacted the prosecutor down there. We have a better grasp of who he is. I think he did 54 or 52 days in jail involving driver's license in that state. Initially, I had told the Court that I would recommend a jail sentence, but I think in light of the facts that I have come across since the trial, I'd recommend a suspended imposition of sentence and a probationary period.

THE COURT: Well, Mr. Thurston, that's a better sentence than I was going to do. You want me to take his recommendation, or want me to do what I was going to do?

MR. THURSTON: I want to be found innocent.

THE COURT: Well, under the facts, the testimony was between yourself, Mrs. Gordon and Mr. Bartlett. The Court found, I realize there's always as you well know, in evidence or in a trial, there is always dispute as to the evidence and it's for the Court to make the determination as to what is the most credible, if you want to say that, evidence. Under the facts that this Court found, I can say that Mr. Bartlett says he saw you on his property crawling underneath the fence. That in itself is sufficient in which there to be a charge and a conviction on that evidence alone. Your testimony as to why you were dressed that way was in dispute. You said one reason. Mrs. Gordon said another reason. You indicated that Mr. Bartlett had stopped you prior to his ever going onto the property, and at that point then you turned around and started the other way. That is in dispute. Mr. Bartlett stated that he'd never saw you prior or stopped and talked to you -- And that's -- about Mr. Gordon coming or not coming. So this Court finds that the credible evidence is that you are guilty of trespass in the first degree. Based on what Mr. Cline has just stated, the Court usually tries to assist the State in that regard because they know more about the sentencing and know more about you than this Court can. So the Court's going accept the SIS or suspending the imposition of sentence which means that you are not convicted of this crime. Until there is a sentencing, there is no conviction. You're found guilty, but as long as you successfully complete the probationary period, at the end of that period if someone ever says were you convicted of trespass in the first degree, you can say no because what I do is we suspend the sentencing, place you on probation to see that you do not violate the law during that time of proba-

tion, and as long as you're successful, then at the end of the probationary period, you have never been sentenced and you have no conviction. Do you understand that?

MR. THURSTON: I think I understand it.

THE COURT: Okay. There is two things. Assuming that we didn't have a trial -- I'll try to explain it this way. Assuming we didn't have a trial and you pled guilty --

MR. THURSTON: No way.

THE COURT: -- your plea of guilty would still be on the record, okay? But if we suspended the imposition of sentence, there would still be no conviction of that charge.

MR. THURSTON: Okay. Is the suspension of the sentence preventing me from an appeal at this time? Would that have an effect?

THE COURT: No. Will it?

MR. CLINE: Yes, Your Honor.

THE COURT: On probation?

MR. CLINE: Yes, Your Honor.

THE COURT: Okay. That's right. You're not sentenced. That's right. You're not sentenced so you can't appeal.

MR. THURSTON: Well, I was hoping for appeal.

THE COURT: Do you want appeal?

MR. THURSTON: Well, if I was convicted, I --

THE COURT: I mean I can convict you.

MR. THURSTON: Well, I don't want a conviction.

THE COURT: Well, it's one or the other. You -- When you walk out of here, you're either convicted or not convicted, Mr. Thurston.

MR. THURSTON: What about the Sheriff? What --

THE COURT: Well, this Court is going to accept the recommendation of the State at this time and not impose sentencing at this time. It will suspend the imposition of sentence, and your recommendation as to the period of probation?

MR. CLINE: I'd recommend six months, Your Honor.

THE COURT: So six months probation, Mr. Thurston, and then you would have no conviction.

MR. CLINE: Your Honor, we would ask that as portion of the probation that he not have any contact with the victim or be around the property or this type of thing, or violate any other laws in the State of Missouri. Be standard terms.

MR. THURSTON: Could I have a recess for a few minutes to -- I'm not that -- I need to ask some questions. I

wasn't counting on what (indiscernible).

THE COURT: Well, since you're not represented, I will give you that time. Normally, I would not. I'd go ahead and impose the suspending of imposition of sentence, but if you feel otherwise, I will give you that time. Okay. Off the record.

THE COURT: Mr. Thurston, we're back on the record.

MR. THURSTON: Okay. Thank you for the recess, Your Honor. I would like to be able to make an appeal, so I -- I would like you to impose sentence.

MR. CLINE: Your Honor, the State's position is that he doesn't have an option to what the Court does as far as sentencing or I would ask the Court to go ahead and suspend that decision if he wants an appeal. It will be up to him to decide what that (indiscernible) prosecuting the new charge and (indiscernible) terms of probation.

THE COURT: Mr. Gordon. Mr. Thurston, rather, I'm going to do what I think is the best thing for you whether you like it or not. Since the State's recommended it, and SIS is a much better thing than having a conviction, I think you'd be wise to accept the SIS and this Court is going to oppose the SIS and six months' judgment, six months' unsupervised probation. Unsupervised means you don't have to report to a probation officer. You're under the supervision of this Court.

MR. THURSTON: With all due respect to the Court, I'd like to object. I would like to have a sentence.

THE COURT: Well, I am not. That is the sentence. If there is a way in which you can appeal my sentencing, then you do so. Okay ?

MR. CLINE: Thank you, Your Honor.

MR. THURSTON: I'd like to make a motion for return of bail in the $1,000 cash bond.

THE COURT: After the costs are paid, you will receive that.

MR. THURSTON: Okay.

THE COURT: Is the money yours?

MR. THURSTON: I didn't put it up. I was in jail.

THE COURT: Okay.

MR. THURSTON: (indiscernible).

THE COURT: Who does it show that --

THE CLERK: (indiscernible).

THE COURT: Okay. Mr. Thurston, the bond shows you having put up the money. I don't know who did it, because I wasn't here.

MR. THURSTON: Okay.

THE COURT: But as long as you are shown as the individual, then we'll take the costs out of it and return

the money.

MR. THURSTON: Okay. Is that done today or --

THE COURT: Whenever the Clerk does it and usually they'll do it within the next three days after the case.

MR. THURSTON: Okay. Well, I don't have a checking account or bank account (indiscernible).

THE COURT: Do you want to come by and pick it up or stick it in the mail to you ?

MR. THURSTON: Yes, I'd like to pick up cash. (indiscernible) cash.

THE COURT: Well, we can't do that. The Court will issue a check.

MR. THURSTON: Okay. Can the Clerk call the bank and have it cashed (indiscernible).

THE COURT: Weli, I -- I assume, I assume that it being a state check, that they'll take it.

MR. THURSTON: Okay.

THE COURT: All you have to do is identify yourself.

MR. THURSTON : Okay.